SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 4, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4918 James Coleman, Index 24930/05
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant.

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Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellant.

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered December 8, 2009, upon a jury verdict, inter alia, awarding plaintiff $600,000 in past pain and suffering, $1,500,000 in future pain and suffering, $1,500,000 in future lost earnings, and $750,000 for future medical expenses, unanimously modified, on the law and the facts, to vacate the award for future lost earnings and the awards for past and future

pain and suffering, and the matter remanded for a new trial solely as to damages for past and future pain and suffering, and otherwise affirmed, without costs, unless plaintiff, within 30 days of service of a copy of this order, stipulates to reduce the award for future pain and suffering to $1,200,000, and to the entry of an amended judgment in accordance therewith.

Plaintiff failed to prove future lost earnings with reasonable certainty (*see DeVirgilio v Feller Precision Stage Lifts, Inc.*, 47 AD3d 522 [2008]; *Harris v City of New York*, 2 AD3d 782, 783-84 [2003], *lv dismissed* 2 NY3d 758 [2004]). The trial evidence was insufficient to support the assumption underlying the award, i.e., that plaintiff would be unable to perform any work for the remainder of his life.

The award for future medical costs was based on legally sufficient evidence and was not against the weight of the evidence. The jury was entitled to credit the testimony of plaintiff's treating physician (*Crooms v Sauer Bros. Inc.*, 48 AD3d 380, 382 [2008]).

We find that the awards for past and future pain and suffering deviate to the extent indicated from what would be

reasonable compensation (*see* CPLR 5501[c]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275-276 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3896-
3897-
3898 Ind. 2870/08

The People of the State of New York,
Appellant,

-against-

Latisha Bowden,
Defendant-Respondent.

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Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Michael McLaughlin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Colleen D. Duffy, J.), entered on or about March 31, 2010, which granted defendant's motion to suppress physical evidence and statements, reversed, on the law and the facts, and defendant's suppression motion denied. Appeal from order (same court and Justice), entered April 29, 2010, which effectively granted the People's motion for reargument, and, on reargument, adhered to the original decision, dismissed, as subsumed in the appeal from the prior order. Order (same court and Justice), entered on or about May 24, 2010, which dismissed the indictment, reversed, on the law, the indictment reinstated, and the matter remitted for further proceedings.

The hearing court erred in suppressing the physical evidence

and defendant's statements. Based upon the testimony of the sole witness, Sergeant Robert Barnett, whose testimony the hearing court properly credited in its entirety, every aspect of the police conduct was properly justified by their observations and the information in their possession.

After taking into custody a man who was wanted in connection with a shooting incident, and receiving from that man insufficient identification and conflicting information both as to his name, which he initially gave as Jason Lawyer, and as to his address, the police determined that on a previous occasion they had arrested a man by the name of Joshua Lawyer with an address of 328 East 197th Street, apartment 4C. In order to confirm the arrested individual's identifying information, Sergeant Barnett and three other police officers went to apartment 4C at 328 East 197th Street in Manhattan, on June 28, 2008, at 2:30 A.M. When the police knocked at the apartment door, a female voice asked who was there, and the Sergeant said "It's the police. Can I have a word with you?" When Sergeant Barnett heard scuffling noises followed by the sound of a window being opened, he sent two of the officers up to the roof of the building. Those two officers reported afterward to the Sergeant that once on the roof, they observed a figure emerge from a

fourth-floor window and ascend the building's fire escape to the roof, with an object in hand. Once the individual arrived on the roof, one of the officers announced "Police. Don't move."[1] The individual dropped a bag, which landed with a loud thud. One officer detained the individual, identified at the hearing as defendant, and the other retrieved the dropped bag, which was made of canvas. Through the fabric of the bag the officer who picked it up could feel an L-shaped, hard object causing him to conclude that it was a gun. In fact, when he opened the bag, he found a loaded pistol as well as a magazine and five rounds within another bag contained within the outer bag.

It is true that the police did not initially have any information about the apartment's contents or its occupants when they first approached the apartment, except that the accused perpetrator of a shooting might have lived there. It is also true that individuals of whom the police have no reasonable

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[1] There is no evidence at all that the police directed or instructed the individual to drop the bag. After Sergeant Barnett testified on direct examination that the officers said, "Police. Don't move," on cross-examination *defense counsel* asked, "And they tell the individual to drop it, correct? Drop the bag?" When the witness merely said, "I'm not sure exactly what they said. I know they said police, don't move," defense counsel rephrased his question, to "They said police don't move, correct?" which the witness confirmed.

suspicion of criminal activity have the right not to answer an officer's question, or even to run from the police, without those acts creating grounds to detain that individual (*see People v May*, 81 NY2d 725, 728 [1992]; *People v Howard*, 50 NY2d 583, 586 [1980], *cert denied* 449 US 1023 [1980]). However, we reject the dissent's view that the police had insufficient grounds to detain defendant by the time she arrived on the roof. Rather, we conclude that the totality of the information known to the police by the time defendant was observed on the roof holding the bag was sufficient to create a reasonable suspicion that defendant was involved in some criminal activity, entitling them, under *People v De Bour* (40 NY2d 210, 223 [1976]), to detain her and pat down the canvas bag she had dropped.

In *People v Howard*, the police had approached a man on the street, having no prior information regarding his criminal activity, merely because he was holding a vanity case and purportedly looking "furtive," and they detained him when they caught up to him after he ran from them (50 NY2d at 587). Similarly, in *People v May*, the police detained two people based on their being seated in a parked automobile on a deserted street at 2:30 A.M., and detained them after they drove off when the police approached. Here, in contrast, the police did not begin

with no information at all; rather, the apartment in question was the possible address of a man charged with a shooting. When the apartment's occupant attempted to flee rather than respond to the police when they arrived at the door, although that fact alone did not give them the right to detain defendant, they had no obligation to simply allow her to flee; they were entitled to pursue her, as in *People v May*, where the Court observed that although the officers had no legal basis to stop the car when they did, they could have followed the car and run the plates to determine whether it was stolen (81 NY2d at 728).

The officers' observations of defendant holding an object as she exited her apartment through the window and climbed up the fire escape to the roof, when considered together with the information that had led them to the apartment in the first place, provided justification for the police to identify themselves as police and direct her to stop once she reached the roof. By that point, their observations and the information known to them had risen to the level of a reasonable suspicion that defendant had been or was then engaged in criminal activity, specifically, that she was trying to avoid the police's detection of some contraband, possibly relating to the shooting underlying their initial approach to the apartment. This information

justified a stop and frisk under *People v De Bour*.

There are certainly similarities between these circumstances and those in *People v Singh* (291 AD2d 419 [2002], *lv denied* 98 NY2d 655 [2002]), where police went to an apartment based on an anonymous tip of drugs contained there and received unresponsive answers from behind an apartment door, after which the apartment occupant attempted to flee by jumping out a second floor window and off the roof of a shed. However, due to the *Singh* decisions's mixing of language applicable to *De Bour* level-two stops and that applicable to *De Bour* level-three stops, particularly since the *Singh* decision relied on cases where level-three stops were found to be justified, we decline to rely on *Singh* for the conclusion that only a level two right of inquiry was created there by the information possessed by the police. It is worth noting, however, that unlike the facts in *Singh*, the underlying investigation here concerned an actual shooting, not an anonymous report of drug possession; this element necessarily creates in the minds of the investigating officers the constant spectre that a weapon might be uncovered in the course of investigation.

Having properly detained defendant, there was no impropriety in the officer's "frisk" or "patdown" of the bag. It was in

defendant's "grabbable area" at the time of the stop, it was retrieved moments after defendant was detained, and the thud it made upon being dropped as well as the connection between the apartment and the shooting suspect gave the officers grounds to "pat down" the bag (*see Matter of Gregory M.*, 82 NY2d 588, 591 [1993]; *People v Brooks*, 65 NY2d 1021, 1023 [1985]; *People v Corbett*, 258 AD2d 254, 255 [1999], *lv denied* 93 NY2d 898 [1999]). The testimony that defendant was "secured" before the bag was frisked did not render the frisk of the bag improper (*see People v Smith*, 59 NY2d 454 [1983]; *People v Wylie*, 244 AD2d 247 [1997], *lv denied* 91 NY2d 946 [1998]). Nor does it matter that Sergeant Barnett did not testify that the officers were concerned for their safety at the time defendant was detained and her bag patted down; that they had reason to suspect the presence of a gun at that moment is enough (*People v Fernandez*, 88 AD2d 536 [1982]).

The hearing court's reliance on *People v Gokey* (60 NY2d 309 [1983]) was misplaced. *Gokey* stands for the proposition that the police may not perform a warrantless *search* of a duffel bag simply because it had been within the grabbable area of a suspect at the time of his arrest (*id.*). Importantly, in *Gokey* there was no concern about a gun, and the Court observed that the police

left the bag on the ground when they arrested the defendant, indicating a lack of any sense of exigency (*id*. at 311). *Gokey* does not deal with circumstances in which police, upon taking hold of a defendant's bag immediately after detaining that defendant, have reason to be concerned that it contains a gun, and upon palpation, can feel the presence of a gun within.

When, upon feeling the contents of the bag, the officer felt the distinctive weight and L-shape of a firearm, he was justified in searching the bag (*see People v Prochilo*, 41 NY2d 759, 762 [1977]; *People v Corbett*, 258 AD2d at 255). Accordingly, the gun contained in the bag and defendant's subsequent statements were lawfully obtained.

All concur except Tom, J.P. and Freedman, J. who dissent in a memorandum by Tom, J.P. as follows:

TOM, J.P. (dissenting)

Supreme Court properly suppressed a handgun and ammunition recovered from a bag defendant Latisha Bowden dropped upon being detained at gunpoint by police. While her activities provided a founded suspicion that criminality was afoot so as to warrant the exercise of the common-law right to inquire, they fell short of providing the reasonable suspicion that defendant was committing or about to commit a crime necessary to support a forcible stop and detention that might have justified the warrantless search of her effects (*De Bour*, 40 NY2d 210, 223 [1976]).

At a combined *Huntley/Dunaway/Mapp* hearing, the court heard testimony from a single witness, Sergeant Robert Barnett, who was the supervisor of a team consisting of four officers who went to 328 East 197th Street in Manhattan in the early morning of June 28, 2008, arriving at approximately 2:30 A.M. In connection with an investigation into a shooting, the team had arrested one Joshua Lawyer, who was being held on a charge of attempted murder. Because Lawyer had provided them with more than one name and one address, the Sergeant explained, their purpose in going to the East 197th Street location was "to verify he was indeed who he said he was." When Sergeant Barnett, accompanied by his three fellow officers, knocked on the door of apartment 4C, a

female voice quietly asked who was there. After informing her that he was the police, the Sergeant heard "scuffling noises" followed by "the sound of a window opening up. It's very distinct." He instructed Officers Emhardth and Urquiaga to go to the roof while he ran downstairs, leaving Officer Smith at the apartment door.

Officer Urquiaga later reported to Sergeant Barnett what had transpired on the roof, which the Sergeant related at the hearing. Officer Urquiaga had observed a "dark figure" emerge from a fourth-floor window carrying "an object" and begin to ascend the fire escape. He and Officer Emhardth took cover, drew their weapons and waited. As the figure appeared on the roof, Officer Urquiaga said, "Police. Don't move," and the person, later identified as defendant, dropped the bag, which landed with "a loud thud."[1] Although it was dark on the roof, both officers used their flashlights.

Officer Urquiaga, without making any inquiry, placed

[1] Sergeant Barnett did not know whether the officers told defendant to drop the bag, stating, "I'm not sure exactly what they said. I know they said police, don't move."

defendant in custody and handed her off to Officer Emhardth,[2] at which point she was "secured." Officer Urquiaga then retrieved the bag, which was made out of canvas and contained something heavy. He felt or "frisked" the bottom of the bag and detected an L-shaped, metal object which, based on his training and experience, he believed to be a gun. He opened the canvas bag and found that it contained yet another bag, which he also opened, revealing a ".45 caliber firearm. Next to it was a clip and magazine. And next to that were five live .45 caliber rounds."

Officer Urquiaga then asked defendant what she was doing on the roof, to which she replied that "she had this bag and she had -- it didn't belong in her house, and she had to get it out of her house." Defendant was placed under arrest and transported to the 48th Precinct. While en route, she made a second statement that she had not been aware of what was in the bag and that she thought it was a paperweight or some other kind of weight. At the precinct, at about 4:00 A.M., she received *Miranda* warnings and gave a written statement.

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[2] Sergeant Barnett was not sure whether defendant was already in handcuffs at the time Officer Urquiaga passed her off to Officer Emhardth.

The court found that the officers were justified in "pursuing Defendant onto the roof and stopping and detaining her on the roof." The court nevertheless suppressed the contents of the bag concluding that "there was no evidence or testimony of exigency or police safety that would tip the scales away from preserving Defendant's right to privacy" (citing *People v Smith*, 59 NY2d 454, 458 [1981]). The court reasoned that "once Defendant was secured by the police, no exigency or safety issues existed that would necessitate the police officer's 'frisk' of the bag" (citing *People v Gokey*, 60 NY2d 309, 311 [1983]). Because the illegal search was the predicate for defendant's arrest, the court held that the arrest was without legal basis and therefore suppressed both the statement made by defendant in the police car and her subsequent written statement.

On the People's motion for reargument, the court rejected their contentions that defendant had abandoned the bag and that the police had a legitimate, though unarticulated concern for their safety, finding that they were not at the apartment to investigate a violent crime because they already had the shooter in custody. Additionally, the court noted that there was no testimony concerning any threat to the officers' safety, the bag was not within defendant's grabbable area, and defendant was

already in custody and secured before the bag was retrieved and inspected.

On their appeal, the People contend that since the forcible detention of defendant was found to have been "wholly proper" by the hearing court, this Court is foreclosed from considering the issue. They argue that the ruling is not adverse to the prosecution and forms no part of their appeal because the People are not aggrieved by it (CPLR 5511; citing *People v Goodfriend*, 64 NY2d 695 [1984]). The People therefore do not attempt to justify the detention, but proceed on the theory that since defendant's forcible detention was found "wholly proper," the only question for this Court's consideration is whether the "frisk" of the bag was justified. Specifically, the People suggest that the officers entertained legitimate concerns that defendant might have access to a weapon, which might pose a risk both to themselves and members of the public if not secured.

There is no question that the right to frisk is ancillary to a forcible stop and detention. "A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed" (*De Bour*, 40 NY2d at 223). However, the right accrues only where the

circumstances provide "reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor" (*id.*; *see People v Ventura*, 139 AD2d 196, 206 [1988]). Thus, whether the extent of the intrusion upon defendant's liberty by the arresting officers was justified under the circumstances is a question central to this appeal.

It should require no repetition that New York recognizes four levels of official interference with an individual's liberty. The request for information is the most minimal and requires only "some objective credible reason" to approach the individual that does not necessarily implicate criminal conduct (*De Bour*, 40 NY2d at 223). Second is the common-law right to inquire, which permits interference to the extent necessary to gain explanatory information and requires "a founded suspicion that criminal activity is afoot" (*id.*). Third is a forcible stop and detention, which is only permissible when there is *reasonable suspicion* that a specific individual "has committed, is committing or is about to commit a felony or misdemeanor" (*id.*). By statute, an officer making a forcible stop has authority to conduct a frisk if a reasonable threat of physical injury is presented (CPL 140.50[3]). Finally, an officer may arrest an individual if there is probable cause to believe he or she "has

committed a crime or offense in his presence" (*De Bour*, 40 NY2d at 223).

In holding that the pursuit and detention of defendant on the roof by the arresting officers was proper, the hearing court cited to *People v Singh* (291 AD2d 419 [2002], *lv denied* 98 NY2d 655 [2002]). Significantly, *Singh* holds only that a defendant's unresponsive and peculiar answers from behind the closed door of an apartment, together with his attempt to flee by exiting through a second-floor window and jumping off a shed roof afforded police "with reasonable suspicion that criminal activity was afoot" (*id.* at 420), a second-level encounter under *De Bour*. Thus, *Singh* does not support the hearing court's finding of a proper forcible stop, a third-level interference. It is well settled, however, that reasonable suspicion of criminal activity supports only the common-law right to inquire, warranting official interference "to the extent necessary to gain explanatory information, but short of a forcible seizure" (*De Bour*, 40 NY2d at 223). In the matter under review, the hearing court went on to suppress the physical evidence, concluding that while "the facts at issue demonstrate that the police had reasonable suspicion to secure Defendant and inquire further, they did not make further inquiry until <u>after</u> the bag had been

searched."

It is significant that the hearing court did not consider the circumstances sufficient to justify a forcible stop and detention; it simply found the detention of defendant by the officers to have been justified by their need to obtain an explanation for her conduct. This is clearly an erroneous conclusion. While the common-law right to inquire permits police greater latitude to interfere with the individual's freedom than a mere request for information, the level of interference must remain "short of a forcible seizure" (*id.*). Since the officers' confrontation with defendant can only be characterized as a forcible stop and detention, the court clearly erred in finding it to have been justified by the need to obtain explanatory information.

The People identify no information available to the officers prior to the time the bag was searched that would have led a reasonable person to conclude that defendant was involved in the crimes of which she is accused. The People concede that the officers went to defendant's apartment ostensibly to ascertain the identity of a person already held in custody in connection with a shooting. In any event, Sergeant Barnett testified that at the time the officers arrived at the location, they had no

reason to believe that defendant was in any way connected with the crime they were investigating. The majority purports to justify the forcible seizure of defendant by stating that because the officers observed defendant holding an object while exiting the window of her apartment and climbing up the fire escape to the roof, there was "reasonable suspicion that defendant had been or was then engaged in criminal activity, specifically, that she was trying to avoid the police's detection of some contraband possibly relating to the shooting . . ." This is pure speculation after the fact by the majority and not supported by the testimony of Sergeant Barnett. In fact, the two officers who confronted defendant on the roof did not testify and could not have intimated their belief that defendant was engaged in any criminal activity let alone disposing of contraband related to the shooting as suggested by the majority. The officers had no idea who defendant was or her connection, if any, to the suspect in custody. There is no evidentiary support for the majority's theory. Defendant's detention is supported only by her act of leaving her apartment by a window carrying some object, climbing up the fire escape and emerging onto the roof, whereupon she was met by two officers with weapons drawn, dropped the bag — either as directed or in response to illegal police action (*People v*

Ramirez-Portoreal, 88 NY2d 99, 110 [1996]; *see also People v Grant*, 164 AD2d 170, 175-176 [1990], *appeal dismissed* 77 NY2d 926 [1991]; *cf. People v Reyes*, 199 AD2d 153, 154 [1993], *affd* 83 NY2d 945 [1994], *cert denied* 513 US 991 [1994]) — and was placed in handcuffs.

Even if defendant's flight under the circumstances could be said to have afforded the officers with "founded suspicion that criminal activity is afoot," a second level confrontation (*De Bour*, 40 NY2d at 223), the permissible interference by the officers is limited to the common-law right to inquire and gain explanatory information, and does not extend to the immediate forcible detention of defendant and the search of her bag.

In assessing the constitutionality of official intrusion upon the security and privacy of the individual, *De Bour* requires that the reasonableness of each level of interference with an individual's liberty of movement be assessed in view of the knowledge possessed by police at that particular moment (*De Bour* at 216-217). The majority instead adopts the amorphous standard of "the totality of the circumstances" and proceeds "to justify a stop by subsequently acquired suspicion resulting from the stop" (*id.* at 215-216). Such post hoc rationalization was expressly rejected by the Court of Appeals, which noted that its "reasoning

is the same which refuses to validate a search by what it produces" (*id.* at 216). The majority nevertheless upholds the subject search even though the circumstances that led the apprehending officers to become aware of the weapon they recovered did not begin to unfold until after defendant had been forcibly confronted and detained.

The holding in *People v Howard* (50 NY2d 583, 587 [1980], *cert denied* 449 US 1023 [1980]) is instructive in the disposition of this appeal. There, the curiosity of two plainclothes police officers was aroused when they observed Howard carrying a woman's vanity case and looking "furtive." When they drove by in an unmarked car, one of the officers displayed his shield and asked to speak to him. Howard ignored the request and, when the officers persisted, ran away, clutching the vanity case to his chest. The officers gave chase on foot and pursued him into the basement of a building. Cornered, Howard discarded the case. One of the officers recovered the case and opened it, revealing a .38 caliber handgun and packets of heroin. Howard was then arrested.

The Court of Appeals held that while the police officers had a reasonable basis to approach Howard and question him, "there was nothing that made permissible any greater level of intrusion"

(*id.* at 590). The Court noted that Howard "had a constitutional right not to respond" (*id.*). "Nor can the failure to stop or co-operate by identifying oneself or answering questions be the predicate for an arrest absent other circumstances constituting probable cause" (*id.* at 591-592). The Court added that officers are not prevented from conducting further "observation provided that they do so unobtrusively and do not limit defendant's freedom of movement by so doing" (*id.* at 592). As to flight, "where, as here, there is nothing to establish that a crime has been or is being committed, flight, like refusal to answer, is an insufficient basis for seizure or for the limited detention that is involved in pursuit" (*id.*). The Court concluded:

> "The circumstances existing at the moment defendant Howard was seized . . . did not constitute probable cause for arrest. The opening of the vanity case cannot be justified as incident to a lawful arrest, nor since it was as the Trial Judge found outside the grabbable area can it be justified under CPL 140.50 (subd 3). The contents of the vanity case must, therefore, be suppressed unless defendant abandoned it" (*id.*).

Because the hearing court had found that Howard's act of keeping a firm hold on "the case during the entire chase belies intention to abandon" (*id.* at 593), it granted the defendant's motion to suppress and dismissed the indictment against him.

In the matter at bar, defendant was confronted by police not on the street but in her own home, the place to which Fourth Amendment protection against unreasonable search and seizure finds particular application (*see Silverman v United States*, 365 US 505, 511 [1961]). A person approached in her home has no less "a constitutional right not to respond . . . [, to] remain silent or walk or run away" (*Howard*, 50 NY2d at 586). Nor may officers "pursue absent probable cause to believe that the individual has committed, is committing or is about to commit a crime, seize or search the individual or his possessions, even though he ran away" (*id.*; *cf. People v Jenkins*, 209 AD2d 164, 165 [1994]).

To prevail on their claim that the "frisk" of the bag carried by defendant was justified, the People must demonstrate reasonable suspicion that defendant was involved in the commission of a crime (*see People v May*, 81 NY2d 725, 727 [1992]), thereby authorizing a forcible detention, and that the officers reasonably suspected that they were in danger of physical injury by virtue of the detainee being armed (*De Bour*, 40 NY2d at 223). When Sergeant Barnett first spoke to defendant through her apartment door, he concededly had no more than an "objective credible reason" to request information (*id.*). The prosecution argued at the suppression hearing that defendant's

flight from the apartment established "founded suspicion," in direct contravention to *Howard*, which holds that flight does not afford justification for pursuit.

Finally, the People argued that the sound made by the bag when defendant dropped it provided the officers with reasonable suspicion and the basis to conduct a "frisk" of the bag. However, defendant had already been forcibly seized (at gunpoint) at the time Officer Urquiaga heard the "thud" arousing his suspicion as to what the bag might contain. Defendant was secured (in handcuffs) and handed off to an officer by the time the other officer began to search the bag, and the People have identified nothing up to that point that would connect defendant with the commission of any crime or subject the officers to the threat of physical injury. Contrary to the People's contention at the hearing, defendant clearly had standing to contest the search of the bag, as reflected by the factors of possession, privacy and exclusive access. As stated in *People v Ramirez-Portoreal* (88 NY2d at 111), defendant "was in actual and sole possession of it. The bag was closed, evincing an effort to maintain the privacy it afforded." Here, defendant was in actual possession of the bag and was holding it when she was induced to drop it. The police then forcibly detained defendant and,

without making any inquiry to obtain information to suggest the commission of a crime, began to search the bag, a clear violation of the permissible level of interference under *De Bour*. Finally, defendant's subsequent statement that the contents of the bag did not belong in the apartment "does not necessarily indicate that [s]he lacked the right to exclude others from access to it" (*Ramirez-Potoreal*, 88 NY2d at 111-112). The bag had been kept in defendant's apartment, and there is no evidence to indicate that any other person was provided with access.

Accordingly, the order granting suppression should be affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4030 Russel S. Bernard, Index 103456/09
Plaintiff-Appellant,

-against-

Proskauer Rose, LLP, et al.,
Defendants-Respondents.

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Antoni Albus, LLP, Los Angeles, CA (John Antoni of the Bar of the State of California, admitted pro hac vice, of counsel), and Simon & Partners LLP, New York (Kenneth C. Murphy of counsel), for appellant.

Proskauer Rose LLP, New York (Charles S. Sims of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered October 21, 2009, which granted defendants' motion to dismiss the complaint for failure to state a claim under CPLR 3211(a)(7), unanimously affirmed, with costs.

In this action for legal malpractice, breach of fiduciary duty and breach of contract, plaintiff alleges that defendants Proskauer Rose, LLP (Proskauer) and Michael Album (Album), a partner at Proskauer, failed to adequately advise him regarding his departure from Oaktree Capital Management, L.P. (OCM), a real estate investment hedge fund. Plaintiff alleges that as a result of defendants' negligence he was sued in arbitration by OCM and sustained damages in the amount of $51.5 million, including

forfeited incentive fees, compensatory damages paid to OCM, and legal fees.

The following facts are undisputed: In 1995, plaintiff was employed by OCM to develop, manage, and market certain real estate funds. In early 2005, OCM began preparations for a new real estate fund (ROF IV), which, despite being his direct responsibility, plaintiff failed to develop and promote for OCM.

In October 2005, plaintiff made an offer in OCM's name to purchase 60 Main Street, a real estate investment opportunity he first learned of in November 2004. The offer was made without OCM's knowledge or permission, and plaintiff furnished OCM's financial information in support. In November 2005, plaintiff entered into a purchase agreement for the 60 Main Street property in the name of one of his own entities, Westport Property Management, LLC.

On or about November 1, 2005, plaintiff decided to leave OCM. Album, a partner in Proskauer's Employee Benefits and Executive Compensation Group retained by plaintiff in October 2004, began discussions with OCM's general counsel for plaintiff's departure. On November 18, while discussions were ongoing, plaintiff resigned in writing as an employee and principal "effective immediately" and gave 120 days notice of his

resignation as a member of OCM. On December 1, 2005, plaintiff issued a press release announcing the formation of Westport.

On December 12, 2005, the Executive Committee of OCM voted to expel plaintiff as a member due to his "abrupt departure and his announcement of the formation of a competing entity," and refused to pay him any incentive fees. Plaintiff initiated arbitration against OCM for recovery of fees he was purportedly owed and other damages. During arbitration, OCM learned of plaintiff's misconduct with regard to ROF IV and 60 Main Street and on November 7, 2006, expelled plaintiff as a member on these independent grounds. OCM counterclaimed for damages on the grounds that plaintiff breached his contractual and fiduciary duties, and misappropriated confidential financial information.

In the interim arbitration award, which was incorporated into the final arbitration award issued July 12, 2007, the arbitrator concluded that OCM was "substantially harmed" by the delayed launch of ROF IV and the loss of an investment opportunity in 60 Main Street. The arbitrator further found that although plaintiff had resigned, his justifiable expulsion as a member due to his "gross negligence and willful misconduct" was the equivalent of a termination for cause, precluding recovery of incentive fees from OCM. Accordingly, the arbitrator awarded OCM

$12,325,250 in compensatory damages for one year of lost ROF IV fees, and $6,740,289 in legal fees.[1] On March 21, 2008, the Superior Court of the State of California, County of Los Angeles (Kenneth Freeman, J.) granted OCM's petition to confirm the arbitration. That judgment was affirmed on February 22, 2010 in *Oaktree Capital Mgt., LP v Bernard* (182 Cal App 4th 60 [2d Dist 2010]).

On March 12, 2009, plaintiff initiated this action alleging, inter alia, that defendants failed to adequately advise him of the risks associated with his departure from OCM to start his own real estate investment firm. In his amended complaint, plaintiff alleges that in October 2004, he contemplated leaving OCM and retained defendants in order to "improve compensation levels [for his] group, and if that could not be done, he wanted to leave [OCM]." Plaintiff claims that he explained to defendants that he wanted to preserve his rights to substantial incentive fees and avoid any liability to OCM due to his resignation. Although plaintiff does not allege that he told defendants about the 60

[1]Although the interim award ordered plaintiff to disclose all information necessary for OCM to decide whether to purchase the 60 Main Street property, plaintiff divested himself of controlling interest in Westport, thereby "thwart[ing]" any potential remedy with regard to 60 Main Street.

Main Street opportunity, or that they advised him to purchase the property for Westport, he claims that he informed defendants that he "occasionally purchased properties for his own account, a fact known by OCM."

Plaintiff does not allege that defendants provided him with any guidance with regard to ROF IV until August 2005, when defendants presented him with a "Draft Action Plan" outlining three alternative strategies for exiting OCM. Plaintiff alleges that under the exit plan urged by defendants, he was advised to continue to manage certain funds, but to "*refuse* to work on and develop" ROF IV.

Plaintiff claims that defendants' recommendation in August 2005 to stop work on ROF IV and resign in November led to his expulsion and termination for cause, and resulting losses. He alleges that it was Album who told him to resign in the middle of negotiations, start his new venture (i.e., Westport), and issue the press release announcing the formation of the Westport entity. He contends that had he not resigned, OCM might not have litigated against him for breach of fiduciary duty and he might have avoided his subsequent losses.

On April 1, 2009, defendants moved to dismiss the complaint. Relying on specific findings made at arbitration, the motion

court granted the motion pursuant to CPLR 3211(a)(7) on the ground that plaintiff failed to state a cause of action.

On appeal, plaintiff argues that the motion court, inter alia, erred in relying upon the final arbitration award, and erroneously dismissed the complaint when issues of fact remained. For the reasons set forth below, we find that, contrary to plaintiff's contention, the motion court properly applied arbitral findings to plaintiff's malpractice claim and all factual issues were resolved as a matter of law (*West 64th St., LLC v Axis U.S. Ins.*, 63 AD3d 471 [2009]).

It is well settled that prior arbitration awards may be given preclusive effect in a subsequent judicial action (CPLR 3211[a][5]; *Matter of Metro-North Commuter R.R.Co. v New York State Exec. Dept. Div. of Human Rights*, 271 AD2d 256, 257 [2000]). Because mutuality of parties is not required, a defendant may preclude a plaintiff from relitigating an issue resolved against that plaintiff in an earlier arbitration with a different defendant (*see B.R. DeWitt, Inc. v Hall*, 19 NY2d 141 [1967]; *Prospect Owners Corp. v Tudor Realty Services Corp.*, 260 AD2d 299 [1999] citing *Corto v Lefrak*, 203 AD2d 94 [1994], *lv dismissed* 86 NY2d 774 [1995]; *see e.g. Spasiano v Provident Mut. Life Ins. Co.*, 2 AD3d 1466 [2003]; *Samhammer v Home Mut. Ins. Co.*

of Binghamton, 120 AD2d 59 [1986]). Thus, collateral estoppel arising out of arbitral findings may be applied offensively to bar the legal malpractice claim in this case (*see e.g. GUS Consulting Gmb v Chadbourne & Parke LLP*, 74 AD3d 677 [2010]).

Here, the arbitrator found that plaintiff's dilatory conduct with regard to ROF IV, self-dealing with regard to the 60 Main Street opportunity, and misappropriation of OCM's financial information constituted breaches of his fiduciary and contractual duties. The arbitrator specifically found that "[b]eginning in early 2005" plaintiff was "stalling the launch of [ROF] IV so that he could deflect possible investment sources to the new entity he was forming." The arbitrator found that during the summer of 2005, plaintiff formed Westport Capital Partners, LLC, and began collecting OCM information to take with him to his new venture. He requested a list of all of his contacts at OCM and copies of quarterly investment letters, and obtained detailed information about OCM investments made by specific investors.

Relying on the arbitrator's factual findings, the motion court determined that plaintiff's course of misconduct began well before any purported advice received by plaintiff from defendants in August 2005. The court observed that there was no indication that "defendants knew of, or advised plaintiff to purchase 60

Main Street" for Westport, or to "collect[] OCM's financial information for his personal use." The motion court concluded that these activities, which the arbitrator found to be breaches of fiduciary duty and/or contractual duty, would have resulted in his justifiable expulsion regardless of his resignation.

The factual findings and issues resolved by the arbitrator establish that it was plaintiff's own misconduct prior to and apart from any advice from defendants that led to his termination for cause. The plaintiff had a full and fair opportunity to litigate these facts and issues at arbitration, and the application of collateral estoppel precludes him from relitigating them in this malpractice action (*see e.g. GUS Consulting Gmb*, 74 AD3d 678-679; *Fajemirokun v Dresdner Kleinwort Wasserstein Ltd.*, 27 AD3d 320 [2006], *lv denied* 7 NY3d 705 [2006]).

Because the arbitral findings establish as a matter of law that defendants were not the cause of plaintiff's losses, the motion court properly dismissed plaintiff's complaint (*see Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [2007], *affd* 11 NY3d 195 [2008]). Plaintiff's claim that had he not resigned, he may have been able to hide his fraudulent activities, continue to collect fees, and reach an agreement with

OCM is purely speculative and does not raise a triable issue of fact (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434-436 [2007]; *GUS Consulting Gmb*, 74 AD3d at 679; *Phillips-Smith Speciality Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 [1999], *lv denied* 94 NY2d 759 [2000]).

Plaintiff's causes of action for breach of fiduciary duty and breach of contract were also properly dismissed by the motion court as duplicative, since they arose from the same facts as the legal malpractice claim and allege similar damages (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [2003]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

4445-
4445A
& M-588

Index 105370/07
590354/08

Gary Fama, et al.,
Plaintiffs-Respondents,

-against-

Cityspire, Inc., et al.,
Defendants-Appellants,

Reckson Associates Realty Corp., et al.,
Defendants.

- - - - -

Cityspire, Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

GlobeOp Financial Services LLC,
Third-Party Defendant-Respondent.

_____

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Cityspire, Inc. and Tishman Speyer Properties, L.P., appellants.

Morici & Morici, LLP, Garden City (Carolyn M. Canzoneri of counsel), for Fama respondents.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for GlobeOp Financial Services LLC, respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 16, 2010, which, insofar as it denied the motion of defendants Cityspire, Inc. and Tishman Speyer Properties, LP for summary judgment dismissing the complaint, and denied their motion for a conditional judgment against defendant

GlobeOp Financial Services LLC, unanimously affirmed, without costs. Appeal from aforesaid order insofar as it denied the cross motion of defendant OneSource Facility Services, Inc., s/h/a OneSource Management, Inc. for summary judgment dismissing the complaint unanimously withdrawn in accordance with the terms of the stipulation of the parties hereto.

Plaintiff Gary Fama slipped and fell on wet paper towels in the men's bathroom of premises leased by his employer, third-party defendant GlobeOp, owned by defendant Cityspire and managed by defendant Tishman. Defendant Cityspire had retained OneSource to provide cleaning services. Dismissal of the complaint on the basis that defendants Cityspire and Tishman were out of possession landlords or lacked either actual or constructive notice of the hazardous condition was properly denied (*see Corrales v Reckson Assoc. Realty Corp.*, 55 AD3d 469 [2008]). Triable issues of fact regarding notice were raised by the deposition testimony of plaintiff, who stated that he had complained about the condition of the bathroom multiple times, of GlobeOp's witness, who stated that she had passed on complaints about the bathroom to Tishman and of Tishman's witness, who stated that she had received the complaints and passed them on to OneSource (*see David v New York City Hous. Auth.*, 284 AD2d 169,

171 [2001], *see also Lehr v Mothers Work, Inc.*, 73 AD3d 564 [2010]). Plaintiffs' action against OneSource has been settled pursuant to a stipulation dated June 13, 2011.

Finally, Cityspire and Tishman failed to meet their prima facie burden of establishing entitlement to summary judgment on the issues of contractual and conditional indemnification. Neither defendant was a party to the sublease agreement upon which they rely to establish indemnity. Further, although Cityspire was a party to the Consent to Sublease, that agreement premises indemnification on the terms of a Master Lease which was not made a part of the record. By failing to submit the Master Lease, Cityspire and Tishman failed to meet their prima facie burden, and questions of fact exist regarding the extent of GlobeOp's obligation, if any, to indemnify Cityspire.

M-558 - Fama v Cityspire, Inc., et al.

Motion to dismiss portions of appeal denied as moot.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4799 Erasmo Santos, et al., Index 7327/07
Plaintiffs-Respondents,

-against-

National Retail Transportation, Inc., et al.,
Defendants-Appellants.

_____

Foster & Mazzie, LLC, New York (Mario A. Batelli of counsel), for appellants.

Law Office Of Jack Yankowitz, Great Neck (Harvey G. Lockhart of counsel), for respondents.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered July 14, 2010, which, to the extent appealed from as limited by the briefs, denied that portion of defendants' motion to set aside the jury's verdict, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, the motion granted, and the matter remanded for a new trial.

Initially, we note that defendants failed to submit a copy of the transcript to the motion court. However, we are entitled to take judicial notice of it (*see generally Samuels v Montefiore Med. Ctr.*, 49 AD3d 268, 268 [2008]*; see also People v Davis,* 161 AD2d 787, 788 [1990], *lv denied* 76 NY2d 939 [1990]).

Defendants failed to preserve their argument challenging the court's remarks to the jury. Any objections made in the

unrecorded sidebar are insufficient to preserve the issue on appeal; defendants must make a specific objection on the record (*see Gayle v Port Auth. of N.Y. & N.J.*, 6 AD3d 183, 184 [2004]). However, because the court's error was "fundamental," we exercise our discretion to review the argument in the interests of justice (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 564 [2009]).

After trial, the court submitted a verdict sheet containing ten special interrogatories in support of a general verdict. Interrogatory number six asked, "As a result of the accident, has the plaintiff Erasmo Santos, sustained a significant limitation of the use of a body function or system?" Under interrogatory six, the instructional note to the jury stated, "Proceed to the next question." Interrogatory number seven asked, "As a result of the accident has the plaintiff, Erasmo Santos, sustained a permanent consequential limitation of use of a body organ or member?" The instructional note to the jury under interrogatory seven stated, "If you answered 'no' to questions #6, and #7, proceed no further and report your verdict to the court. If you answered 'yes' to either of questions #6, or #7, proceed to question #8."

The jury returned a verdict which answered "No" to interrogatories six and seven. However, rather than report the

verdict as the instructions required, the jury went on to award $70,000 to Erasmo Santos for past pain and suffering, $45,000 for future pain and suffering, and $5,000 to Milagros Santos for loss of services.

Plaintiffs' counsel requested a sidebar. According to defendants' counsel, during the sidebar, he asked the court to "poll the jury as to whether it agreed with the verdict read by the Trial Court concerning interrogatories six and seven," and plaintiffs' counsel "requested that the trial Court question the jury as to its 'intent' to award damages." That discussion was not made a part of the transcript.

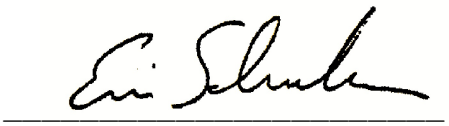
The court then explained to the jury, "You've given us a verdict, but the verdict is contrary to the instructions that were given to the jury on the jury sheet." After explaining the inconsistency, the court stated, "But, factually, so everybody knows what is going on, I'm going to ask each of you to let us know if it was your intention to make a monetary award or not." The trial court then polled the jury and each of the jurors answered in the affirmative.

The court was well within its discretion in making a limited inquiry into an inconsistency in the jury's verdict prior to

discharging the jury (*see Sharrow v Dick Corp.*, 86 NY2d 54, 61 [1995]). However, the court's inquiry as to whether each juror intended to make a monetary award was so prejudicial as to require a new trial.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011



DEPUTY CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4905 Ricardo Flores, Index 8996/07
Plaintiff-Appellant,

-against-

ERC Holding LLC, et al.,
Defendants-Respondents.

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Pollack, Pollack, Isaac & De Cicco, New York (Jillian Rosen of counsel), for appellant.

White, Quinlan & Staley, LLP, Garden City (William R. White of counsel), for ERC Holding LLC, respondent.

Chesney & Murphy, LLP, Baldwin (Henry D. Nelkin of counsel), for 458 E. 144th Street Realty Corp., respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for West Star Construction Corp., respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered June 15, 2010, which, to the extent appealed from as limited by the briefs, granted defendants ERC Holding LLC's and West Star Construction Corp.'s motions for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, upon a search of the record, awarded defendant 458 E. Street Realty Corp. summary judgment dismissing the complaint as against it, and denied plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action, unanimously affirmed, without costs.

Plaintiff, a steel framing laborer employed by nonparty subcontractor Kriti Contracting, was injured at a facility in Bronx County that Kriti leased from defendant 458 Street Realty for the storage of its equipment and materials. Kriti had been retained to perform steel framing work by defendant West Star Construction, the general contractor for a project to erect a building on property owned by defendant ERC in Queens County. Plaintiff reported for work at Kriti's Bronx facility, as he regularly did, where he was directed to cut several 17-foot steel beams from 40-foot lengths. After completing the first cut, he was instructed by Kriti's principal (who was also West Star's principal) to affix the 700-pound steel beam to the bucket of a backhoe so that the beam could be lifted onto a truck for transport to the Queens construction site. Plaintiff was injured when the backhoe shifted and tilted causing the beam to come loose from the cables that bound it, fall to the ground and bounce up, striking plaintiff, who was helping to guide the beam with his hands. There is evidence in the record that there was uneven ground and debris in the storage yard and that the cables and chains holding the beam to the backhoe bucket could have been better secured. There is also evidence that other beams were transported to the Queens site from the Bronx storage yard for

use in construction that day, that plaintiff had cut one beam to the requisite size before he was injured, and that plaintiff was to have gone in the transport truck to work at the Queens construction site for the rest of the day.

Performing construction work for purposes of Labor Law § 240(1) (*see Joblon v Solow*, 91 NY2d 457, 465 [1998] [material alteration to the premises]) and working at a construction site for purposes of Labor Law § 241(6) (*see Mosher v State of New York*, 80 NY2d 286 [1992] [repaving project]) are distinguished from fabricating and transporting materials to be used in connection with ongoing work at a construction site. Dispositive is that at the time of his injury, plaintiff was engaged in the fabrication and loading of steel at his employer's Bronx facility, not in performing construction work at the Queens site (*Jock v Fien*, 80 NY2d 965, 967 [1992] [fabrication not involving any construction activity at the time of injury]; *Dahar v Holland Ladder & Mfg. Co.*, 79 AD3d 1631 [2010] [worker engaged in normal manufacturing process at employer's facility]; *see also Pirog v 5433 Preston Ct., LLC*, 78 AD3d 676 [2010] [stockpiling pipes at storage facility was neither construction work nor work performed in a construction area]; *cf. Nagel v Metzger*, 103 AD2d 1, 8 [1984] [hoisting and land clearing constitute construction work

under Labor Law § 241(6)]).

Cases extending Labor Law protection to injuries sustained at the work site while handling materials essential to the construction project (*e.g. Brogan v International Bus. Machs. Corp.*, 157 AD2d 76 [1990] [transport from one end of a building to the other "necessitated by and incidental to the construction"]) or while fabricating material integral to the construction work at a separate on-site facility (*e.g. Shields v General Elec. Co.*, 3 AD3d 715 [2004] [fabrication building 100 yards from building under construction]) are distinguishable by such factors as physical proximity and common ownership and operation of the premises. Applying the Labor Law to fabrication performed and loading of steel beams onto a truck for transport some 12 miles away at a facility that is independently owned and operated would be an untoward extension of the protection afforded by the Legislature (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *see also Adams v Pfizer, Inc.*, 293 AD2d 291, 292 [2002], *lv denied* 99 NY2d 511 [2003]). Thus, "at the time of the accident, the plaintiff was not engaged in construction work within the meaning of Labor Law § 240(1) and was not working in a construction area within the meaning of Labor Law § 241(6)" (*Pirog*, 78 AD3d at 677), and these claims were properly

dismissed.

In addition, since plaintiff's accident occurred at an off-site storage yard that ERC did not own and there is no evidence that ERC controlled the storage yard in any manner, ERC is not subject to liability under § 240(1) in any event (*see Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 611 [1993]). Nor is defendant 458 Realty, which owned the storage yard, subject to liability under the statute, since it was not a construction site owner that had hired a construction contractor (*see id.*). The construction work was being performed on ERC's property in Queens, and it was ERC, not 458 Realty, that hired West Star as the general contractor.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4990 The Lansco Corporation, Index 603066/08
Plaintiff-Respondent,

-against-

Jacky Kampeas, et al.,
Defendants-Appellants.

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Lawrence A. Omansky, New York, for appellants.

Lionel A. Barasch, New York, for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 8, 2010, which, in this breach of contract action, granted so much of plaintiff's cross motion as sought summary judgment as to liability and denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant defendants' motion to the extent of dismissing the complaint against Jacky Kampeas and amending the caption and complaint to substitute as defendant Senkam Inc. in place of Samcek Inc., and to deny so much of plaintiff's cross motion as sought summary judgment as to liability, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Jacky Kampeas.

The record establishes that plaintiff misnamed the corporate signatory to the parties' agreement, and that there was no

wrongful conduct by the individual defendant. Accordingly, the IAS court should have granted defendants' motion to dismiss to the extent of dismissing this action against the individual defendant (*cf. Imero Fiorentino Assoc. v Green*, 85 AD2d 419, 420-421 [1982]), and amending the caption and complaint to substitute as the correctly named corporate defendant Senkam Inc., which has consented to such substitution (*see generally Le Sannom Bldg. Corp. v Lassen,* 173 AD2d 249, 249-250 [1991]).

The court also should have denied so much of plaintiff's cross motion as sought summary judgment as to liability. Contrary to defendants' contention, their attempt to orally terminate the agreement was ineffective, because the agreement required that it be terminated in writing and contained an integration and no oral modifications clause (*see Chemical Bank v Wasserman*, 37 NY2d 249, 251-252 [1975]). However, defendants raised an issue of fact as to whether plaintiff had deprived defendants of the benefit of their bargain and thus violated the covenant of good faith and fair dealing. In particular, defendants presented evidence that plaintiff's conduct in attempting to re-lease the space so alienated the landlord that it expressly refused to approve any tenant procured by plaintiff (*see generally Ellison v Island Def Jam Music Group*, 79 AD3d 458

[2010]).

Contrary to defendants' contention, there is nothing inherently unconscionable about a nonreciprocal attorney's fee provision in a commercial contract (*see e.g. 57 Kingsland Realty Corp. v 57 Kingsland Food Corp.*, 30 Misc 3d 1227[A], 2011 NY Slip Op 50236[U], *2-3 [2011]). Accordingly, defendant Senkam is not entitled to dismissal of plaintiff's second cause of action for costs and attorney's fees.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, JJ.

5406 Linda Spector, et al., Index 104607/07
Plaintiffs-Appellants,

-against-

Cushman & Wakefield, Inc., et al.,
Defendants,

Citibank, N.A.,
Defendant-Respondent.

_____

Weitz & Luxenberg, P.C., New York (Herman Kaufman of counsel), for appellants.

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered January 27, 2010, which, insofar as appealed from as limited by the briefs, granted defendant Citibank, N.A.'s motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

Citibank failed to make a prima facie showing of entitlement to judgment as a matter of law. The injured plaintiff allegedly slipped on a patch of black ice on the sidewalk abutting Citibank's premises. Because Citibank did not refute plaintiffs' contention that the dangerous condition existed, it was required to establish that it did not cause or create the condition or

have actual or constructive notice of it (*see Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [2009]). Citibank has failed to meet its burden with respect to actual or constructive notice of the ice because it proffered no affidavit or testimony based on personal knowledge as to when its employees last inspected the sidewalk or the sidewalk's condition before the accident. This Court has employed similar reasoning with respect to other summary judgment motions made under analogous facts (*see De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [2010]; *Lebron* at 437). The other departments have done the same (*see Rogers v Niagara Falls Bridge Commn.*, 79 AD3d 1637 [2010]; *Mignogna v 7-Eleven, Inc.*, 76 AD3d 1054 [2010]; *Managault v Rensselaer Polytechnic Inst.*, 62 AD3d 1196 [2009]). By contrast, in *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.* (79 AD3d 518 [2010]), we affirmed an order granting an owner's summary judgment motion on the basis of a record that included testimony by the owner's president that he had checked the area of the subject accident on the preceding night (*id.* at 519-520).

Lenti v Initial Cleaning Servs., Inc. (52 AD3d 288 [2008]), which the dissent cites, is distinguishable because it involved a snow removal contractor's motion for summary judgment. Unlike a

contractor, an owner, such as Citibank, has a statutory, nondelegable duty to maintain the sidewalk abutting its premises (*see* Administrative Code of the City of New York § 7-210; *Cook v Consolidated Edison Co. Of NY, Inc.*, 51 AD3d 447, 448 [2008]).

All concur except Tom, J.P. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

On Tuesday, February 14, 2006, at about 8:15 A.M., plaintiff slipped on a patch of ice measuring approximately 7 inches by 10 inches in front of the Citibank branch located on First Avenue at 79th Street in Manhattan. At her examination before trial, plaintiff testified that she had not seen the ice on the sidewalk the night before. Nor did she see the ice on the morning of her fall until, while in the process of getting up, she assumed a kneeling position. She knocked on Citibank's door to see if anyone was present, without receiving any response, and she did not see anyone go in or out.

The branch manager testified that he inspected the sidewalk on the day of plaintiff's accident and saw no ice, although he did not give the time of his inspection. He stated that he knew of no complaints concerning ice on the sidewalk, nor had Citibank received any complaints that water was dripping from scaffolding erected in front of the adjoining building. He noted that snow and ice removal were the responsibility of defendant Cushman & Wakefield, the property manager.

Citibank established its prima facie entitlement to judgment as a matter of law. The testimony of its branch manager demonstrates that it did not create the alleged icy condition or

have actual or constructive notice of it, shifting the burden to plaintiff to present evidence raising a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff failed to present evidence from which it might be inferred that the ice on which she slipped was present on the walk for a long enough period of time to permit Citibank, as the party responsible for the sidewalk, to discover and remedy the dangerous condition (*see Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 289 [2008]). Since there is no evidence as to whether the ice resulted from a 26-inch snowfall two days earlier or was the later product of a freeze/thaw cycle, as opined by her expert, her contention that it was the result of improper snow removal is speculative (*see Disla v City of New York*, 65 AD3d 949 [2009]).

Citibank was not obliged to submit evidence of when the sidewalk was last inspected by its employees. Absent evidence of actual notice, the issue is whether the hazardous condition was "visible and apparent" and extant for a sufficient duration to permit Citibank's employees to discover it and take remedial measures (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). As an initial consideration, the record does not establish that the hazard was discernable to any person.

Asked to describe it, plaintiff responded "Black ice." She conceded that she did not see it, either on the preceding evening or even on the morning of her fall, until she was kneeling close to the ground after slipping on the ice.

Furthermore, the record does not support the conclusion that there was sufficient opportunity for Citibank's employees to identify and remedy the hazard. Even assuming that the ice formed at 6:15 P.M. the preceding evening, as plaintiff's expert concluded, there is no evidence to suggest that any Citibank employee was present to discover the ice at any time prior to plaintiff's fall. Thus, plaintiff has failed to come forward with proof to satisfy either of the criteria for constructive notice set forth in *Gordon*.

Finally, plaintiff's contention that Citibank failed to prevent the icy condition by not properly maintaining the scaffolding that abutted its premises' sidewalk is devoid of merit. Citibank's branch manager testified that the bank did not hire the installer of the scaffolding and had not received any complaints of water dripping off of the scaffolding onto the sidewalk. Plaintiff recalled only that she observed water dripping from the scaffolding on the day of her accident but not whether she observed water dripping from any portion of the

scaffolding that was in front of Citibank's premises. She did not observe any water dripping onto the sidewalk where she was walking, and she did not know where the ice came from. Thus, her testimony was insufficient to defeat summary judgment on this issue (*see Slates v New York City Hous. Auth.*, 79 AD3d 435, 435-436 [2010], *lv denied* 16 NY3d 708 [2011]).

Accordingly, the order should be affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5436N Ann Fredrickson, Index 260649/09
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about November 3, 2010, which granted petitioner's motion for leave to serve a late notice of claim on respondent, nunc pro tunc, without the necessity of further physical service, affirmed, without costs.

Although petitioner failed to submit medical evidence to support her contention of physical incapacitation, the lack of a reasonable excuse for failing to serve a timely notice of claim is not determinative (*see Matter of Ansong v City of New York*, 308 AD2d 333, 334 [2003]). Petitioner averred that she reported the essential facts of her accident to respondent's management office within three days of her trip and fall. Accordingly, the court had a basis for finding that respondent acquired actual knowledge of the essential facts constituting the claim within

the statutorily prescribed time period or a reasonable time thereafter (*see* General Municipal Law § 50-e[5]). Further, respondent has not shown that it was prejudiced by petitioner's eight-month delay in seeking leave to serve a late notice of claim (*see Laguna v New York City Hous. Auth.*, 74 AD3d 498, 499 [2010]). Indeed, there is no evidence of any witnesses to petitioner's accident. Nor is there any contention that the step upon which petitioner allegedly tripped has changed from the date of her accident.

All concur except Saxe, J.P. and Catterson, J. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

I concur with the majority that the record contains no proof whatsoever that petitioner was so incapacitated by her injuries that she was incapable of contacting an attorney so that a timely notice of claim could be filed. See e.g. Matter of Rivera v. New York City Hous. Auth., 25 A.D.3d 450, 451, 807 N.Y.S.2d 373, 374 (1st Dept. 2006). However, I disagree with the majority's view that respondent "acquired actual knowledge of the essential facts constituting the claim . . .," and so I must respectfully dissent.

Petitioner's vague and unsubstantiated allegation that she reported her accident to "the woman behind the window" is plainly insufficient to satisfy plaintiff's burden of proving that respondent acquired actual knowledge. Matter of Barzaga v. New York City Hous. Auth., 204 A.D.2d 163, 164, 612 N.Y.S.2d 122, 123 (1st Dept. 1994)("[t]he vague and unsubstantiated allegation that the condition was reported to the building superintendent some days after the accident is insufficient to warrant granting the relief sought"); see Lopez v. New York City Hous. Auth., 193 A.D.2d 473, 597 N.Y.S.2d 402 (1st Dept. 1993). Even if one were to credit petitioner's claimed reporting, there is nothing on the

record that establishes that respondent had sufficient information that put respondent on notice that a claim would be filed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011

DEPUTY CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3746 The People of the State of New York, Ind. 3210/03
Respondent,

-against-

Allan Andrade,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered May 30, 2006, affirmed.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Leland G. DeGrasse
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

3746
Ind. 3210/03

_____x

The People of the State of New York,
Respondent,

-against-

Allan Andrade,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered May 30, 2006, convicting him, after a jury trial, of manslaughter in the first degree and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco and Peter D. Coddington of counsel), for respondent.

FRIEDMAN, J.

Based in significant part on self-incriminating statements he made while in police custody, defendant was convicted of shooting another person to death. By raising a challenge at trial to the voluntariness of his inculpatory statements, defendant opened the door to the introduction of the evidence the police had placed before him to elicit those statements. The admission of this evidence -- a videotape of the interview of a nontestifying witness and a photo array from which that witness had identified defendant -- did not violate the hearsay rule or defendant's right of confrontation, because the evidence was admitted, not as proof of the matters asserted therein, but to rebut defendant's claim that his statements to the police were involuntary, a claim the People were required to disprove beyond a reasonable doubt (*see People v Huntley*, 15 NY2d 72, 78 [1965]; CPL 60.45[1]; CPL 710.70[3]; CJI2d[NY] Statements [Admissions, Confessions] - Custodial Statements). In view of the People's heavy burden of proof on a jury issue that defendant himself injected into the case, it cannot be said that the prejudicial effect of the evidence in question outweighed its probative value. We therefore affirm defendant's conviction of first-degree manslaughter.

According to the People's evidence, Waldrine Ewool and his

friends were approached on the street late at night by two men who got out of a car and demanded that Ewool hand over his expensive leather jacket. When Ewool refused, one of the perpetrators shot him at least four times, inflicting fatal wounds. The incident took place in the Bronx during the early morning hours of December 1, 2002, less than a half hour after a shooting incident in nearby Mount Vernon. A witness to the Mount Vernon shooting (in which no one was injured) later identified defendant from a photo array as one of the shooters in that incident. Police connected defendant to the Bronx homicide based on ballistics evidence showing that one of the guns fired in the Mount Vernon incident was the weapon used to kill Ewool the same night.

Under police questioning, defendant at first denied knowledge of the Bronx homicide, claiming that he had been at a party at the time, although the police had not yet told him what time Ewool was shot. The police then showed defendant a videotape of the witness describing the Mount Vernon shooting and identifying defendant from a photo array as the shooter; defendant was also shown the photo array itself. Thereafter, defendant at first denied having been involved in either shooting, although he asked whether any one was injured at Mount Vernon. After the police told him no one was injured in the

Mount Vernon incident, defendant admitted that he had fired a gun at a van in Mount Vernon because he thought a person in the van was retrieving a gun. Defendant also admitted to having been present at the Bronx incident, but denied having fired a gun there. After further questioning, in which defendant was told that ballistics evidence showed that the same gun was used in both incidents, he stated that he had fired his gun into the air at the Bronx incident to ward off a perceived threat to his friend, but it was his friend who had shot Ewool. Defendant's pretrial motion to suppress his statements was denied.

At his first trial, defendant demanded that the voluntariness of his statements to the police be submitted to the jury. At the same time, he objected on hearsay grounds to the admission of the videotape and the photo array that had induced him to incriminate himself. Defense counsel asserted that defendant should "have a chance to cross-examine" the witness on the videotape. As an alternative to admitting the videotape and photo array or calling the witness himself, defense counsel offered to stipulate to have the jury told that defendant was shown a videotape "indicat[ing] that [he] participated in a shooting up at Mount Vernon." The court overruled the objection to the admission of the videotape and photo array, noting that "[t]he People are seeking to have the videotape played not for

the truth of the matter. They're not asking the jury in any way to draw the conclusion that what the person on the videotape says is true and that, based upon that, what the defendant said about his participation in Mount Vernon is false."

The first trial ended in a hung jury. Before the start of the second trial, the People sought a ruling on the admissibility of the videotape and photo array. The People again argued that this evidence was admissible to show that defendant's statements were voluntary, a point the defense had controverted at the first trial. In response, defense counsel, while continuing to take the position that the voluntariness of the statements should be submitted to the jury, reasserted (without repeating) the arguments against the admission of the evidence that the defense had raised at the first trial. The justice presiding at the second trial (who had not presided at the first trial but was familiar with its record) adhered to the ruling made at the first trial that the videotape and photo array were admissible to show the voluntariness of defendant's statements. At the second trial, when the videotape and the photo array were received into evidence and again during the final charge, the court instructed the jury as to the limited purpose for which the exhibits could

be considered.[1] Defendant was convicted of manslaughter in the first degree.

At the outset, we reject defendant's argument that the inculpatory videotaped and written statements he made in custody should have been suppressed. In particular, the suppression court properly concluded that the conditions and circumstances of defendant's custody did not render his statements involuntary. Defendant's remaining arguments for suppression of his statements were also properly rejected.

We now turn to defendant's argument that the trial court erroneously admitted into evidence the videotape of the witness identifying him as a shooter in the Mount Vernon incident and the photo array from which that identification was made. Defendant argues that the admission of this material violated the rule against hearsay, as well as his right to confront the witnesses against him under the federal and state constitutions (US Const 6th, 14th Amends; NY Const, art I, § 6; *see Crawford v Washington*, 541 US 36 [2004]) and the rule against admission of

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[1]Among other things, the court instructed the jury: "I've admitted into evidence [the videotape and the photo array] shown to [defendant] not to prove what the person [in the video] picked out of the photo array, just to show what the defendant was seeing and hearing so that [you] could judge any response that the defendant made, if he did make a response. The limited purpose for which [you] are allowed to consider this evidence is what makes it nonhearsay under our law."

out-of-court photographic identifications and bolstering of out-of-court identifications (*see People v Trowbridge*, 305 NY 471 [1953]).[2] However, as argued by the People and concluded by the trial court, the videotape and the photo array were offered, not for the truth of the matters asserted therein, but as evidence of the voluntary nature of the self-incriminating statements they induced defendant to make, and therefore the admission of this evidence did not violate the hearsay rule, *Crawford* or *Trowbridge*. Contrary to the argument of the defense, it is well established that a defendant who controverts the voluntary nature of his inculpatory statements opens the door to otherwise inadmissible evidence that places those statements in their correct context (*see People v Mateo*, 2 NY3d 383, 425-427 [2004], *cert denied* 542 US 946 [2004]).[3]

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[2]The People argue that only the hearsay claim is preserved. Since we find all of the claims unavailing for the same reasons (as discussed below), we need not determine the extent to which the arguments other than hearsay were preserved.

[3]Defendant seeks to distinguish *Mateo* on the ground that there the Court of Appeals held admissible portions of the defendant's own statement that would have been inadmissible but for his challenge to the statement's voluntary nature. However, defendant cites no authority holding the principle recognized in *Mateo* inapplicable where, as here, the evidence needed to place the defendant's inculpatory statement in context is the recorded statement of an absent witness that prompted the defendant to make the statement. We are not persuaded that the *Mateo* principle should be so limited.

Although defendant has not emphasized this line of argument on appeal, at the first trial his counsel sought to avoid having the jury shown the videotape and the photo array by offering to stipulate to telling the jury that defendant was shown a videotape "indicat[ing] that [he] participated in a shooting up at Mount Vernon." The implicit predicate of this position (which counsel at the second trial adopted by reference) was that the proffered stipulation, by obviating the need for the videotape and the photo array themselves to show defendant's motive for his in-custody statements, so radically changed the balance between the evidence's probative value and its potential prejudice as to render it inadmissible (*see e.g. People v Scarola*, 71 NY2d 769, 777 [1988]). This argument fails because the offer of the stipulation cannot bear such outcome-determinative weight.

The general rule in most American jurisdictions has been expressed by the United States Supreme Court as follows:

> "[T]he prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, . . . a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the [prosecution] chooses to present it. . . . [T]he reason for the rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight" (*Old Chief v United States*, 519 US 172, 186-187 [1997] [internal quotation marks and citations omitted]).

Moreover, as the *Old Chief* Court further explained,

> "A party seemingly responsible for cloaking something [from the jury] has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.
>
> "In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it" (*id.* at 189).[4]

Similarly, a leading treatise states:

> "[A] colorless admission by the opponent may sometimes have the effect of depriving the party of the *legitimate moral force of his evidence* . . . . Hence, there should be no absolute rule on the subject; and the trial court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances" (9 Wigmore, Evidence § 2591, at 824-825 [Chadbourn rev 1981] [footnote omitted]).

New York law accords with the foregoing. In *People v Merzianu* (57 AD3d 385 [2008], *lv denied* 12 NY3d 819 [2009]), a prosecution for second-degree assault, this Court held that the trial court "properly exercised its discretion in permitting a physician to testify about the victim's injuries even though defendant had expressly conceded the element of serious physical

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[4]The *Old Chief* Court concluded, however, that the general rule did not apply in that case because the facts underlying the prior convictions to which the defendant wished to stipulate were irrelevant to the prosecution's case.

injury" (*id.* at 386). In *Merzianu*, we relied upon the Second Department's decision in *People v Hills* (140 AD2d 71 [1988], *lv denied* 73 NY2d 855 [1988]), which, after an extensive discussion of this issue (140 AD2d at 77-83), concluded both that the trial court properly declined to compel the People to accept a defense offer to stipulate to an element of the crime and that the probative value of the evidence defendant had sought to exclude outweighed any unfair prejudice resulting from its admission (*see also* Prince, Richardson on Evidence § 8-215, at 523 [Farrell 11th ed] ["a party cannot be compelled to accept an adversary's offer to stipulate to certain facts"]; *but see People v Robinson*, 93 NY2d 986, 987 [1999] [declining to "pass on the correctness" of the *Hills* holding because the defense "never effectively conceded the issue" in question]).

In this case, unlike in *Merzianu* and *Hills*, the defense did not offer a stipulation to avoid having the People present evidence proving a statutory element of the crime charged. Nonetheless, defendant's inculpatory statements were a key part of the People's proof of his guilt. Hence, by claiming to the jury that his statements had been coerced, defendant imposed on the People the additional burden of proving beyond a reasonable doubt that he made those statements voluntarily. In effect, the defense added an additional element to what the People were

required to prove. It was only fair for the trial court to allow the People, in proving the voluntariness of defendant's statements, the same leeway to which the People were entitled in proving a statutory element of the crime under *Merzianu* and *Hills*. By choice of the defense, the People became obligated to tell, not only the story of the victim's death, but also the story of how defendant came to make the statements being used against him. It was just as necessary for the People "to present to the jury a picture of the events relied upon" (*Old Chief*, 519 US at 187) with regard to the voluntariness of defendant's statements as it was with regard to the statutory elements of the crime.

Given that the defense saddled the People with the burden of proving what motivated defendant to make the statements forming the centerpiece of the prosecution case, the People were entitled to "the legitimate *moral force of [their] evidence*" (*Hills*, 140 AD2d at 83, quoting Wigmore, *supra*) on that point. The People's case would have been significantly weakened had they been limited to defendant's cold, sterilized admission that he was shown a videotape "indicat[ing] that he participated in a shooting up at Mount Vernon." The People were entitled to have the jury see and hear what defendant had seen and heard at the police station -- the video of a witness both identifying him from a photo array

and describing his conduct in the Mount Vernon incident. Only from actually watching the video and examining the photo array would the jury have received the full picture of what prompted defendant to talk to the police. The People were entitled to present that full picture to carry their burden of disproving the contention that defendant's statements had been coerced simply by the length and circumstances of his confinement. "The stipulation could not have carried the same force [as the information defendant actually received] in proving motive" (*United States v Thevis*, 665 F2d 616, 635 [5th Cir 1982], *cert denied sub nom Evans v United States*, 456 US 1008 [1982] [trial court properly received into evidence transcript of murder victim's FBI interviews detailing defendant's involvement in criminal activity, which transcript defendant had obtained before the murder, notwithstanding defendant's offer to stipulate to his knowledge of the victim's cooperation with the government]).

In sum, the trial court properly exercised its discretion in receiving the videotape and photo array into evidence with appropriate limiting instructions, which the jurors are presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). Notwithstanding the stipulation offered by the defense, the trial court reasonably determined that the probative value of the videotape and the photo array on the issue of the voluntariness

of defendant's statements -- an issue the defense chose to inject into the case -- outweighed their potential to cause unfair prejudice. Moreover, we find adequate the court's repeated instruction to the jury that the videotape and the photo array were to be considered only for the limited purpose of determining the voluntary nature of defendant's self-incriminating statements, and not for the truth or falsity of the witness's identification of defendant as a shooter at Mount Vernon.

Defendant's remaining arguments for reversal are without merit. Any error in precluding defense counsel from referring in his opening to defendant's statements, which the People asserted that they had not yet decided to use, was cured by the court's offering defense counsel an opportunity to reopen in the event the People subsequently decided to introduce those statements. The court articulated a reasonable basis for the exercise of its discretion to have defendant restrained during trial, in view of his demonstrated violent propensities, which were brought to its attention on the record. We note that there is no indication in the record that defendant's restraints were visible to the jury or that the restraints impeded his communication with counsel. Defendant's claim that the use of restraints violated his constitutional right to the presumption of innocence is not preserved, and we decline to review it in the interest of

justice.

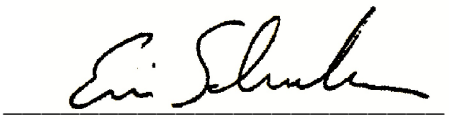
Finally, we find that defendant's conviction comports with the weight of the evidence, and we perceive no basis for a reduction of the sentence.

Accordingly, the judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered May 30, 2006, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to 25 years of imprisonment, to be followed by 5 years of postrelease supervision, should be affirmed.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 4, 2011



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